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IN THE

Supreme Court Of The United States

October Term, 1962

No. 531

COMMONWEALTH OF PENNSYLVANIA

vs.

FRANK JOSEPH BURNS,
Petitioner

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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CASES CITED

	Page
White River Lumber Co. vs. Arkansas, 279 U. S. 692, 700, 49 Sup. Ct. 457, 460	3
Williams vs. United States, 168 U. S. 382, 18 S. Ct. Rep. 92	4

STATUTES CITED

United States Constitution Amendment XIV	3
Section 822 of Act of June 24, 1939, P.L. 872, 18 P.S. 4822	2

ANNOTATIONS

144 ALR 585	4

COUNTER-STATEMENT OF THE CASE

The facts of this case are accurately set forth in the opinion of the Superior Court of Pennsylvania. It is important to note that contrary to the statement of the petitioner, the petitioner did not use the money withheld from Cambria County on behalf of the patients at the Cambria County Home, but rather applied it for his own benefit. This is shown by the following:

(1) Petitioner, by records produced and by his own admission, withheld public funds from the County Treasurer;

(2) Petitioner, by his own admission and testimony of others, did not advise the proper authorities of the county that funds were so withheld;

(3) Petitioner deposited these funds in his own personal checking account;

(4) Petitioner was unable to provide any accounting as to what deposits in this account were his personal deposits and what deposits constituted funds withheld from the county;

(5) Records and receipts, last in the possession of the petitioner, were incomplete and missing at the time of trial;

(6) Petitioner, by his own admission, did not inform anyone, including the proper county authorities, of any expenditures allegedly made for the inmates of the institution. The first knowledge of such action came at trial, nine months after the formal charges had been filed;

(7) Checks which petitioner alleges were issued in payment for inmate care and services were so designated solely by the testimony of the petitioner. Corroborating evidence was to a large extent limited in nature;

(8) Purchases which petitioner claimed were for county purposes were, in many instances, discovered to have been made for Canteen purposes. Inmates, visitors and employes utilized the services of the Canteen and paid for products obtained. No accounting of this operation was obtainable from the petitioner;

(9) Petitioner claimed certain purchases were made for county purposes despite available budgetary allocations for such purchases;

(10) During the period of the indictments, petitioner deposited approximately $50,000.00 in two personal accounts in two local banks;

(11) During the period of the indictments, petitioner deposited $5,447.00 in a savings account in the Johnstown Savings Bank;

(12) During the period of the indictments, petitioner purchased a Lincoln, two Cadillacs and a Thunderbird;

(13) During the period of the indictments, petitioner made stock investments totalling $3,746.04 and within two months subsequent to the last date of indictment, purchased a home for $25,000.00 in cash; and

(14) During the period of indictments, the combined take-home pay of the petitioner and his wife was $14,513.01.

The contention that Section 822 of the Act of June 24, 1939, P.L. 872, 18 P.S. 4822, which states,

> "Whoever, being an officer, employe or agent of this Commonwealth, or political subdivion thereof, charged with the collection, safekeeping, transfer or disbursement of public money, converts to his own use, in any way whatsoever, or uses by way of investment, in any kind of property or merchandise,

> any portion of the public money entrusted to him for collection, safekeeping, transfer or disbursement, or proves a defaulter, or fails to pay over the same when thereunto legally required by the person authorized to demand and receive the same, or aids or abets or is an accessory to any such act, is guilty of embezzlement, a felony, and upon conviction thereof, shall be sentenced to undergo imprisonment, by separate or solitary confinement, at labor, not exceeding ten (10) years, or to pay a fine not exceeding the amount of the money embezzled, or both,"

is unconstitutional as being in violation of the 14th Amendment because of vagueness and uncertainty was not raised at any time in the courts below and is being presented for the first time to your Honorable Court.

> Where it does not appear from the record that a constitutional question was presented or passed upon by the Supreme Court of the State and it is sought to raise this question for the first time by assignments of error in this court, it is necessarily excluded from consideration. *White River Lumber Co. vs. Arkansas*, 279 U. S. 692, 700, 49 Sup. Ct. 457, 460.

Furthermore, it cannot be seriously contended that the embezzlement statute is vague and indefinite. The Act applies to any employe of a political subdivision of the Commonwealth of Pennsylvania charged with the collection of public money and who converts it to his own use.

Petitioner Burns was an employe of a political subdivision of the Commonwealth of Pennsylvania, Cambria County, and the evidence clearly showed that he, as Superintendent of the Cambria County Home, was directed by the Commissioners of the county to collect support payments from the patients and to turn them over to the County Treasurer. The Superior

Court's interpretation of the statute is a logical one. The other statutes referred to in petitioner's brief concern embezzlement statutes much narrower in scope than the Pennsylvania Act which applies to employes or agents. Further, as shown by the Annotation found in 144 ALR 585, the majority of jurisdictions would interpret these more limited Acts to apply to petitioner.

Admission of petitioner's financial transactions was relevant and material. An essential element of the offense charged was the conversion of funds "to his own use."

Having established petitioner's obligation to collect funds, and his actual receipt of funds, it then became germane to show the disposition (or conversion) of the same.

It was imperative that financial transactions be admitted into evidence in order to establish the conversion of the public funds.

The mere commingling of public funds with personal funds would have constituted a conversion within the meaning of the Act.

This cause is distinguished from *Williams vs. United States*, 168 U. S. 382, 18 S. Ct. Rep. 92.

It may be distinguished in the following manner:

(a) the wide disparity between petitioner's assets and financial transactions;

(b) the relationship or chain of continuity brought about by the evidence that patients' checks were cashed in large volume—and similar deposits of cash items in large amounts in petitioner's personal account; and,

(c) the subsequent defense and admission by petitioner that public funds were deposited in his own personal account—but allegedly used for public purpose.

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for a writ of certiorari should be dismissed.

FERDINAND F. BIONAZ
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of Cambria County

W. LOUIS COPPERSMITH
Assistant District Attorney
of Cambria County

CERTIFICATE OF SERVICE

I certify that I have served by mail upon Arnold D. Smorto, Esquire, and Vincent M. Casey, Esquire, Attorneys for the Petitioner, five copies of the foregoing Answer to Petition for Writ of Certiorari.

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